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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1495

YALE BROADCASTING COMPANY, ET AL., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITIONERS' REPLY BRIEF

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1. The Government avoids the major question in this case. The issue involved is not the validity of some long-established principle that licensees must generally know the content of their programming. Petitioners do not dispute that licensees must be familiar with the quality and general subject matter of their programming.

The question, rather, is the constitutional validity under *Smith* v. *California*, 361 U.S. 147 (1959), of a unique and

unprecedented requirement that licensees must ascertain the social meanings of songs, analyze their individual words, decide whether they glorify illegal conduct, and determine their ultimate impact on the listening audience.

The requirement in this case goes far beyond general familiarity with programming content.[1] It requires licensees, for the first time, to analyze the meaning of popular programming—on a word-by-word basis, and at a managerial level—and judge the "value" of its social message. It singles out song lyrics from other types of programming and subjects them to special procedural burdens. It raises, for the first time, the threat of license revocation for inadequate screening.

The implications of the Government's argument are threatening. Once the Commission's doctrine is established for drugs, there is nothing to prevent the Commission from applying it to violence, sex, political radicalism, or any other area of agency concern.[2] Once the doctrine is established

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[1] The Government's reliance (Brief in Opp., p. 7) on *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), is therefore misplaced. The *NBC* decision merely states that licensees can not wholly ignore the content of network programs. Even if *NBC* did suggest that a licensee must determine whether its programming is "satisfactory" (319 U.S. at 206), it did not set forth a criterion by which "satisfactory" programming should be judged. In particular, *NBC* did not require licensees to audit specific words in its programming, or single out references to specified topics, or make judgments on their social value.

[2] Many operas, for example, depict some form of "illegal" behavior. *Tosca* portrays murder. *Aida* concludes with a suicide. *Salome* depicts a vivid decapitation. *Masked Ball* ends with regicide—the murder of a king. Under the Commission's doctrine, the Government could revoke a station's license for failing to "know the content" of the operas it played—that is, for failing to make a judgment whether their words and lyrics might tend to promote illegal behavior, or might have an adverse "impact" on its audience.

for song lyrics, there is nothing to prevent the Commission from applying it to drama, comedy, or other forms of programming. In each instance, the Commission would be requiring licensees to analyze the content of their programming not for its artistic quality but for the social and moral message hidden in its words. This roving license to intrude on licensees' speech is unprecedented in constitutional law.[3]

2. The Government fails to distinguish *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970). Contrary to the Government's contention, that case did not involve a ruling on criminal liability. In *New York State Broadcasters*, as here, the Commission was asked to issue an *administrative* determination that a broadcaster would forfeit his license for broadcasting specific material. The Commission's decision could have had no binding effect on the licensees' criminal liability under the Lottery Act (18 U.S.C. § 1304), and no effect on the Justice Department's decision to prosecute. *New York State Broadcasters* involved only an administrative ruling, and is indistinquishable from this case.

There was nothing "abstract" about Yale's proposed operating "Policy." Yale submitted a detailed six-page proposal (see Pet. App. 30a) to the Commission. It specifically asked the Commission whether its proposal to broadcast anti-drug public service and news announcements was a satisfactory alternative to screening individual records for their meanings. The Commission refused to rule on Yale's request, even though its proposal was as detailed and specific as the proposals involved in

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[3] *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 492-93 (1962) (Opinion of Harlan & Stewart, JJ.) (burden of requiring publisher to investigate each advertiser raises a "substantial constitutional question"); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 41 U.S.L .Week 4688, 4706 n.18 (U.S., May 29, 1973) (Douglas, J., concurring).

New York State Broadcasters.[4] The conflict is clear and should be resolved.

Respectfully submitted,

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[4] Petitioners in *New York State Broadcasters* asked the Commission, among other things, whether they would jeopardize their license if they broadcast "announcements (unpaid) of the places where Lottery tickets may be purchased" (414 F.2d at 992). The Commission refused to rule on this question, and the Court specifically ordered the Commission to resolve it.

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